No. 85-2006

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF AMICI CURIAE AMCORD, INC., ET AL. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

E. BARRETT PRETTYMAN, JR.*
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Amici Curiae
Amcord, Inc., et al.

* Counsel of Record

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are twenty-five corporations[1] engaged in interstate commerce, including activities in the State of Washington that subject them to the Washington business and

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[1] Amcord, Inc., Apple Computer, Inc., CPG Products Corporation, Darling Delaware Company, Inc., Del Monte Corporation, Delco Electronics Service Corporation, Ecko Products, Inc., Eddie Bauer, Inc., General Mills, Inc., General Mills Products Corporation, General Motors Corporation, Gifford-Hill Company, Inc., Glaco Corporation, Hewlett Packard Company, J.I. Case Company, Life Savers, Inc., McNeilab, Inc., Monroe Auto Equipment Company, Nabisco, Inc., Ortho Pharmaceutical, Sandvik Special Metals Corporation, Tektronix, Inc., 3M, Triangle Pacific Corporation, and York Manufacturing Company. This brief is filed with the consent of the parties.

occupation tax at issue in this appeal. Amici are directly affected by the taxes at issue here and have a direct interest in the resolution of this appeal. Like appellants, amici filed actions in the Thurston County Superior Court for refunds of business and occupation taxes paid to appellee Department of Revenue, contending that the Washington tax scheme discriminated against interstate commerce in violation of the Commerce Clause, U.S. Const. art. I, § 8. The present appeal involves fifty-three separate actions joined for decision by the Superior Court and consolidated for appeal to the Washington Supreme Court. As that latter court noted in its opinion upholding the Washington tax, "52 other substantially similar actions are pending in Thurston County Superior Court." App. to J.S. at A-1. Actions of amici are in addition to those actions, and the resolution of this appeal will have a direct effect on amici's pending refund actions.

In addition, quite apart from this particular appeal, amici have a strong interest in protecting interstate commerce from discriminatory state and local taxation. Amici engage in extensive interstate commerce, and are subject to a wide variety of taxes imposed by states and municipalities. This Court's disposition of the present appeal not only will affect amici directly, in light of their pending refund actions, but also will affect the future development of state and municipal taxation practices in a manner that will have long-term significance for the various activities engaged in by amici.

ARGUMENT

The decision of the Washington Supreme Court in this case is a direct challenge to the continued validity of this Court's recent and near-unanimous decision in *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). The statute at issue in the present appeal has the same economic effect on interstate commerce as the statute struck down in *Armco*, yet the Washington Supreme Court reached a result opposite that of *Armco*, based on reasoning directly at odds with the reasoning of *Armco*, in an opinion betraying evident disagreement with the clear guidance provided by *Armco*. The question before the Court in this appeal is whether the clear rules set forth in *Armco* will survive, or be replaced by the contrary analysis of the court below.

In *Armco* this Court held that a West Virginia wholesale gross receipts tax from which local manufacturers were exempt discriminated against interstate commerce in violation of the Commerce Clause. West Virginia imposed a gross receipts tax on wholesaling and a gross receipts tax on manufacturing in the State. Washington also imposes a gross receipts tax on wholesaling and a gross receipts tax on manufacturing in the State. West Virginia granted an exemption from one of its taxes for a wholly local business that paid the other; Washington also grants an exemption from one of its taxes for a wholly local business that pays the other. The only distinction is that West Virginia granted an exemption from the wholesaling tax to local manufacturers who paid the manufacturing tax, while Washington grants an exemption from the manufacturing tax to local manufacturers who pay the wholesaling tax.

In considering State efforts to prefer domestic business over interstate commerce, this Court has been careful not to rely upon "a distinction without a difference * * *." *Metropolitan Life Ins. Co.* v. *Ward*, 105 S. Ct. 1676, 1684 (1985). The essential similarity between the West Vir-

ginia and Washington tax schemes is indisputable. This similarity was recognized by appellee Department of Revenue when it argued unsuccessfully in favor of the West Virginia tax as amicus curiae in *Armco*,[2] by the Supreme Court of Washington when it first upheld the Washington tax,[3] by several Justices of this Court,[4] and by commentators.[5] The essential similarity of the West Virginia and Washington taxes is a result of the fact that Washington once had the same tax scheme as West Virginia. When the Washington Supreme Court invalidated that scheme in *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 192 P.2d 976 (1948), the Washington legislature promptly reversed the scheme and exempted wholly local business not from the wholesaling tax but from the manufacturing tax. The question is whether such a semantic maneuver should be considered determinative in Commerce Clause analysis.

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[2] Brief of the State of Washington Department of Revenue as Amicus Curiae 1 (Washington tax "very similar to the West Virginia tax").

[3] *B.F. Goodrich Co.* v. *State*, 38 Wash. 2d 663, 668, 231 P.2d 325, 328, *cert. denied*, 342 U.S. 876 (1951) (differences between present Washington tax and previous Washington tax identical to West Virginia tax "may well be * * * verbal niceties").

[4] *General Motors Corp.* v. *State*, 377 U.S. 436, 460 (1964) (Goldberg, J., dissenting) (present Washington tax and previous Washington tax identical to West Virginia tax "have essentially the same economic effect on interstate sales * * *"). The majority in *General Motors* held that the Washington tax did not violate the Due Process Clause, but refrained from passing on the Commerce Clause issues presented by this appeal. 377 U.S. at 449. The four dissenters did reach the issues presently before the Court, and determined that the precise tax at issue in this case violated the Commerce Clause. *See id.* at 451 (Brennan, J., dissenting); 459-462 (Goldberg, J., dissenting, joined by Stewart and White, JJ.).

[5] *See* Judson & Duffy, *An Opportunity Missed*: Armco, Inc. v. Hardesty, *A Retreat from Economic Reality in Analysis of State Taxes*, 87 W. Va. L. Rev. 723, 743 (1985) (Washington tax "is the mirror image of the West Virginia scheme").

In *Armco*, this Court held that the West Virginia statute discriminated on its face against interstate commerce, violating the basic principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642. As the Court explained:

> The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax * * * is imposed on the sale price. [*Id.*]

The Washington Supreme Court asserted that the Washington tax "is not facially discriminatory," App. to J.S. at A-12, but it is clear from the foregoing that this *ipse dixit* cannot be supported. The Washington tax is qualitatively no different from the West Virginia tax, save in that an exemption is provided for local manufacturing rather than local wholesaling. To paraphrase the above quotation from *Armco*, the Washington tax provides that two companies manufacturing tangible property in Washington will be treated differently depending on whether the taxpayer conducts wholesaling in the State or out of it. Thus, if the property was sold in the State, no tax on the manufacture is imposed. If the property was sold out of the State, a tax is imposed on the manufacture.

In the quotation from *Armco*, the discrimination against interstate commerce was most evident with respect to products crossing the border *into* West Virginia. Of two competing sellers in West Virginia, the interstate business paid a wholesale tax while the wholly local business did not. The reversal of the tax and the exemption in the Washington scheme means that the discrimi-

nation against interstate commerce is clearest with respect to products crossing the border *out of* Washington. Of two competing manufacturers in Washington, the interstate business pays a manufacturing tax while the wholly local business does not. Both the Washington and West Virginia statutes, on their face, tax a transaction "more heavily when it crosses state lines than when it occurs entirely within the State," 467 U.S. at 642, and the direction in which the flow of commerce is burdened is irrelevant for Commerce Clause purposes. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 535 (1949) ("[t]his Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, *either into or out of the state* * * *") (emphasis supplied).

In any event, the Washington tax also discriminates on its face against interstate commerce flowing into the state. An out-of-state manufacturer shipping goods into Washington pays a wholesale tax on Washington sales, as does its competitor which manufactures in Washington. The Washington-based business, however, receives an exemption from the manufacturing tax, solely because it sells its goods in the local market rather than in interstate commerce. The out-of-state business receives no comparable benefit or exemption. In Washington, interstate commerce is subject to taxation from which local commerce is exempt.[6]

In *Armco*, this Court rejected the argument that the wholesaling tax could be applied only to out-of-state manufacturers as a "compensating tax" for the manufacturing tax imposed by the State on local manufacturers.

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[6] The court below recognized as much, App. to J.S. at A-15 ("local manufacturer-sellers enjoy 'two activities for the price of one' * * *"), as did appellee Department of Revenue, App. to J.S. at K (chart prepared by appellee for state legislature showing commerce crossing the border subject to "2 Taxes" and intrastate commerce subject to "1 Tax").

The Court noted that a tax on one event could only be considered as compensating for a tax on another event if the two events were substantially equivalent. 467 U.S. at 642-643. As the Court explained, "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Id.* at 643 (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981)).

The Washington Supreme Court took the exact opposite tack. Despite this Court's unequivocal ruling that a tax on wholesaling could not be viewed as compensating for a tax on manufacturing, or vice versa, because wholesaling and manufacturing were not substantially equivalent events, the state court held that the Washington tax on wholesaling and the Washington tax on manufacturing *were* compensating taxes. It rejected as a "disturbing formalism" the view that "manufacturing and wholesaling are never 'substantially equivalent events.'" App. to J.S. at A-11. That, however, is precisely the view adopted by this Court in *Armco*.

The state court sought to justify its bold departure from this Court's ruling by focusing on the particular rates charged under the West Virginia and Washington tax schemes. In doing so, the state court committed an unfortunate factual error that appears to have tainted its legal analysis. According to the state court, the "West Virginia tax exacted substantially different tax rates on manufacturing (.27 percent) and wholesaling activities (.88 percent) * * *." App. to J.S. at A-7. The court then noted that the Washington manufacturing and wholesaling taxes were levied at "substantially identical rates." *Id.*

In fact, the Washington Supreme Court reversed the West Virginia tax rates. West Virginia imposed the higher rate—.88 percent—on local *manufacturers*, and the lower rate—.27 percent—on *sales*. *See Armco*, 467

U.S. at 640 n.2, 641 n.5, 642; *see also id.* at 647 (Rehnquist, J., dissenting). The suggestion permeating the state court opinion that the Washington tax scheme is less discriminatory than the West Virginia tax scheme, because Washington taxes local and interstate commerce at equal rates while West Virginia imposed a higher rate on interstate commerce, is thus based on a factual misconception. Contrary to the understanding of the Washington Supreme Court, West Virginia imposed the higher rate on wholly local business, and yet its tax was still struck down as discriminatory. Focusing solely on the rates, the Washington tax scheme is clearly *more* objectionable than the West Virginia tax scheme that was held in *Armco* to violate the Commerce Clause.

The Washington Supreme Court ruled that the Washington wholesaling and manufacturing taxes could be considered compensating taxes because they were levied at roughly the same rate, while the two West Virginia taxes could not be because they were imposed at different rates. App. to J.S. at A-7. Nothing in this Court's opinion in *Armco*, however, suggested that the determination of whether wholesaling and manufacturing taxes can be considered compensating is based on the specific rates being applied. This Court clearly held in *Armco* that two such taxes could not be viewed as compensating because the two incidents—wholesaling and manufacturing—were not substantially equivalent events. The Court did not suggest that the nature of wholesaling and manufacturing could somehow be transformed into substantially equivalent events if the two events were taxed at the same rate. Indeed, this Court's only pertinent observation was that the rates should be *different:* "One would expect that a manufacturing tax might be larger than a gross receipts tax since an in-state manufacturer normally benefits to a greater extent from services provided by the State than does a transient wholesaler." 467 U.S. at 643 n.6.

As an amicus in *Armco*, the Department of Revenue emphasized the similarities between the West Virginia and Washington taxes. Appearing before the Washington Supreme Court, after the West Virginia tax was struck down in *Armco*, the Department understandably changed course and argued that the taxes were different. The Department sought to justify its change of heart by asserting that "the *Armco* opinion, with its emphasis on the rates and measures of the West Virginia tax, makes the differences between the two states' taxes more significant than their similarities." App. to J.S. at A-7 n.2. Although the state court apparently accepted this assertion at face value, this Court in *Armco* clearly did not emphasize the "rates and measures" of the West Virginia tax. Indeed, this Court expressly declined to consider the effect of the particular rates imposed under West Virginia's scheme, 467 U.S. 642, 644-645, over the strong insistence of the dissent that it should do so, *id.* at 646 (Rehnquist, J., dissenting). The *Armco* opinion deemed "mistaken" the view of the West Virginia court that the taxes were not discriminatory because of the particular rates charged. 467 U.S. at 642. Focusing on particular rates would make Commerce Clause analysis hinge

> "on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce." [*Id.* at 645 n.8 (quoting *Freeman* v. *Hewit*, 329 U.S. 249, 256 (1946)).]

The particular rates might be pertinent in assessing the degree of discrimination against interstate commerce, but no combination of different rates can alter the fact that, in Washington, interstate commerce is subject to two taxes while local commerce is subject to one. *See*

App. to J.S. at K. As the Court stated in *Maryland* v. *Louisiana*, 451 U.S. at 759-760:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

The Washington Supreme Court sought to buttress its surprisingly bold refutation of this Court's conclusion in *Armco* that wholesaling and manufacturing taxes cannot be considered compensating taxes by asserting that the Washington tax exhibited no discriminatory impact. App. to J.S. at A-10. The court stated that "[i]n-state manufacturers selling out of state do not gain a tax advantage by shifting sales of their product to the local market." *Id.* In fact, they do. An in-state manufacturer who shifted sales to the local market could gain an exemption from the manufacturing tax he otherwise would not enjoy if he sold his goods in interstate commerce. The court also stated that "out-of-state manufacturers selling in state gain no tax advantage by moving their manufacturing operations in state." *Id.* In fact, they do. An out-of-state manufacturer selling in Washington would still pay the wholesaling tax if it moved to Washington, but it would gain an exemption from the manufacturing tax. It receives no comparable benefit so long as it remains located outside Washington.

Such discrimination against interstate commerce in favor of local commerce is the precise evil that the Commerce Clause was intended to combat. "One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.'" *Maryland* v. *Louisiana*, 451 U.S. at

754 (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959)). The Washington tax, like the West Virginia tax struck down in *Armco*, has just such an effect.

In any event, in focusing on discriminatory impact, the state court blithely ignored the clear directive of this Court in *Armco* that proof of such impact was not necessary:

> Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. *This is not the test.* [467 U.S. at 644 (emphasis supplied).]

The analysis in *Armco* turned not on proof of discriminatory impact but rather on application of the "internal consistency" test. Under this test the question is whether impermissible discrimination against interstate commerce would result if, hypothetically, other states imposed taxes similar to the subject taxes. As the Court explained, "[i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." 467 U.S. at 644.

Since the Washington tax is the mirror image of the West Virginia tax, it is axiomatic as a matter of logic that it also cannot survive scrutiny under the "internal consistency" test. To paraphrase the Court in *Armco* once again, if any of the other states impose a like tax on its manufacturers—which they have every right to do—then a manufacturer from out of state selling goods in Washington will pay both a manufacturing tax and a wholesale tax, while sellers resident in Washington will pay only the wholesale tax. By the same token, if other states impose a like tax on wholesaling— which they have

every right to do—then manufacturers in Washington will pay both a manufacturing tax and a wholesale tax when they sell goods out of Washington, while manufacturers resident in Washington selling in Washington will pay only the wholesale tax. *See* App. to J.S. at K.

The Washington Supreme Court declined to apply the internal consistency test, for the same reasons the dissent in *Armco* urged the majority not to apply it. The *Armco* dissent criticized applying the test to gross receipts taxes, 467 U.S. at 648, and the Washington Supreme Court also noted that its application to such taxes has been questioned. App. to J.S. at A-11.

Though it ignored the clear guidance provided by this Court in *Armco*, the state court purported to rely on *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977). In that case, this Court spoke favorably in dictum of a pre-1968 New York transfer tax that "was neutral as to in-state and out-of-state sales." *Id.* at 330. Despite the Washington Supreme Court's view, the tax at issue in *Boston Stock Exchange* was not "conceptually identical" to the Washington business and occupation tax. App. to J.S. at A-10. No one could object on discrimination grounds if Washington simply imposed a wholesale tax on sales in the state or a manufacturing tax on manufacturing in the state, or both, so long as any such taxes were levied on intrastate and interstate commerce alike. Such a scheme would be "conceptually identical" to the pre-1968 tax in *Boston Stock Exchange*, but that is not Washington's tax scheme. Washington imposes both wholesaling and manufacturing taxes *and* grants an exemption from the latter *only* to wholly intrastate businesses. No such discrimination accompanied the pre-1968 tax in *Boston Stock Exchange*, and this Court emphasized in that case that such discrimination could not withstand Commerce Clause scrutiny. *See* 429 U.S. at 329.

In its near-unanimous opinion in *Armco*, this Court reaffirmed the bedrock principle of Commerce Clause

jurisprudence that " 'no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " 467 U.S. at 646 (quoting *Boston Stock Exchange*, 429 U.S. at 337). There are no meaningful differences between the West Virginia tax struck down in *Armco* and the Washington tax at issue in this appeal. The court below, in straining to uphold the Washington tax, turned the reasoning of *Armco* on its head. Where *Armco* applied the internal consistency test, the court below did not. *Compare* 467 U.S. at 644 (applying internal consistency test) *with* App. to J.S. at A-11 ("we do not read *Armco* as requiring that the 'internal consistency' requirement be applied to determine discrimination"). Where *Armco* held that manufacturing and wholesaling were not substantially equivalent events, the court below held that they were. *Compare* 467 U.S. at 643 ("manufacturing and wholesaling are not 'substantially equivalent events' ") (quoting *Maryland* v. *Louisiana*, 451 U.S. at 759) *with* App. to J.S. at A-11 ("[t]here is a disturbing formalism in [the] argument that manufacturing and wholesaling are never 'substantially equivalent events' ") *and id.* at A-8 ("the Court [in *Armco*] did not explain what it meant by 'substantially equivalent events' "). Where the Court in *Armco* held that wholesaling and manufacturing taxes could not be compensating taxes, the court below held that they were. *Compare* 467 U.S. at 642 ("gross sales tax * * * cannot be deemed a 'compensating tax' for the manufacturing tax") *with* App. to J.S. at A-9 (sales tax and manufacturing tax are compensating taxes). The state court's disagreement with *Armco* is evident throughout its opinion. For example, the court below relied extensively on commentary critical of *Armco*, *see* App. to J.S. at A-4 n.1, A-11, and viewed its task as one of reconciling *Armco* with that "scholarly commentary," *id.* at A-16.

If this Court permits the decision below to stand, state legislatures and municipalities will inevitably view this action as a departure from *Armco*. A recent study noted

that a "number of states and municipalities utilize a gross receipts tax as a major revenue source," many other states "also impose taxes which closely resemble gross receipts taxes," and "[t]his form of taxation is also growing in popularity among municipalities." Judson & Duffy, *supra*, at 726-727. *Armco* stood as a clear warning that states and municipalities using this form of unapportioned taxation may not employ it as a guise to favor local business at the expense of the free flow of interstate commerce. Any departure from *Armco* by this Court would once again present states and cities with the temptation to devise their tax schemes not simply to raise revenue but to favor their own. The history of this Court's Commerce Clause decisions demonstrates that such a temptation has proved nearly irresistible, and once a few states succumb, others feel compelled to retaliate. The end result is "the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland* v. *Louisiana*, 451 U.S. at 754.

These temptations are heightened in the present era of economic readjustment, with intense competition among the states for business and the benefits it brings. It is not parochialism or spite that prompts states to discriminate against out-of-state businesses, but rather the desire to lure such businesses from their neighbors. In *Armco* this Court recognized that states compete with each other " 'for a share of interstate commerce,' " but held that " 'in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " 467 U.S. at 646 (quoting *Boston Stock Exchange*, 429 U.S. at 336-337). Any departure from *Armco* would channel the vigorous and healthy competition among the states from permissible areas back into the ultimately destructive area of discriminatory tax practices.

Permitting the decision of the court below to stand in the face of *Armco* would tend "to bring adjudications of

this tribunal into the same class as a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). This Court could not have intended its decision in *Armco* to be such a fleeting sport, easily circumvented by the legislative legerdemain of switching the tax and the exemption. This Court should reverse the decision below to reaffirm that the principles articulated by the eight Justices in the *Armco* majority only two years ago are of more enduring significance.[7]

CONCLUSION

For the foregoing reasons, and those set forth in the Jurisdictional Statement, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Amici Curiae
Amcord, Inc., et al.

* Counsel of Record

[7] After the decision in *Armco*, the State of West Virginia petitioned for rehearing, urging that the decision be applied prospectively only, except with respect to appellant Armco itself. Petition for Rehearing, *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). This Court denied the petition. 105 S. Ct. 285 (1984). Disposition of amici's refund actions is being held pending resolution of the present appeal. Whatever may be the case with respect to refund actions yet to be filed, it is clear that amici are entitled to the full benefit of any decision by this Court.